

☒ **EXPEDITE** (if filing within 5 court days of hearing)

☒ Hearing is set:

Date: September 12, 2003

Time: 1:30 p.m.

Judge/Calendar: Casey

The Honorable Paula Casey
ATTORNEY GENERAL
OF WASHINGTON

SEP 11 2003

GOVERNMENT & COMPLIANCE
& ENFORCEMENT DIVISION

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

PREMERA, a Washington non-profit
miscellaneous corporation; and
PREMERA BLUE CROSS, a Washington
non-profit corporation,

Petitioners,

v.

MIKE KREIDLER, Insurance
Commissioner for the State of
Washington,

Respondent.

No. 03-2-00112-8

PETITIONERS' MEMORANDUM
REGARDING SCHEDULE OF
ALLEGED DEFICIENCIES

This Court's September 5, 2003 order ("Order") directs the Commissioner to make a decision on Premera's Form A Statement within 60 days of September 5, 2003, "unless no later than Sept. 10, 2003, the Commissioner identifies with specificity those deficiencies in the Form A Statement that were identified prior to November 26, 2002, that still remain outstanding." At 4:00 p.m. on September 10, 2003, Assistant Attorney General Christina Beusch sent counsel for Premera a letter attaching a schedule of three

PETITIONERS' MEMORANDUM REGARDING
SCHEDULE OF ALLEGED DEFICIENCIES - 1

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1 purported deficiencies in Premera's Form A Statement (the "Schedule"). Ms Beusch's
2 letter, including the Schedule, is attached as Appendix A to this Memorandum.

3 The three claims of deficiency set forth in the Schedule are wholly without merit.
4 Contrary to the assertions in the Schedule, not one of the three items is outstanding. Only
5 two of the three were identified as Form A deficiencies as of November 26, 2002. None
6 of the purported deficiencies involve required elements of a complete Form A Statement.
7 Accordingly, the Commissioner has afforded no basis for tolling the 60-day period set
8 forth in the Court's Order for his decision on Premera's Form A Statement.

9 A. The November 2001 Accenture survey has already been provided. Moreover, it is
10 not part of a Form A Statement.

11 Item 1 on the Schedule is a November 2001 survey authored by Accenture in
12 connection with an unrelated conversion proposal, involving CareFirst in Maryland.
13 Exhibit E-7 to the Form A Statement cites this survey for two propositions: first, "that the
14 amount of expenditures needed [for certain listed items] by the average health plan with
15 revenues over \$500 million could be between \$90 and \$190 million over the next three to
16 five years ..." (Ex. E-7, pp. 19-20); and second, "that health plans with revenues greater
17 than \$500 million could spend between \$30 and \$50 million to become fully compliant
18 with HIPAA [Health Insurance Portability and Accountability Act of 1996] guidelines."
19 (Exh. E-7, p. 25) Both statements in Exhibit E-7 to the Form A are drawn from a single
20 chart in the Accenture survey.

21 As John Cake (the author of this portion of the Form A Statement) explains,
22 Premera has provided the November 2001 survey to the OIC Staff and to the States'
23 Consultants. In response to their request, Premera gave the States' Consultants a hard
24 copy of a January 2002 follow-on report by Accenture that contains the very same chart
25 relied upon by Mr. Cake. Declaration of John B. Cake ("Cake Decl."), ¶¶ 4-5. As Ms.

1 Beusch notes, Premera referenced the Bates ranges for the January 2002 report in its
2 response to the OIC Staff's November Deficiency Notice. See Declaration of Katharine
3 M. Cramer ("Cramer Decl."), ¶ 4(a). In response to further data requests from the States'
4 Consultants seeking the November 2001 Accenture survey, Mr. Cake explained to them
5 that the document was part of the public record in the CareFirst proceeding, and he gave
6 them a link to web pages where the document could be viewed. Cake Decl., ¶ 6. One
7 such link still pulls up the November 2001 survey:
8 <http://carefirst.onlinepresskits.com/pdf/cfappendix.PDF>. The States' Consultants
9 confirmed that they were satisfied with Premera's response and closed the data requests.
10 Cake Decl., ¶ 7.

11 Mr. Cake's declaration establishes beyond any doubt that the November 2001
12 Accenture survey and the chart upon which Mr. Cake relied, which is also found in
13 Accenture's January 2002 report, were made available to the OIC long ago.¹ Even if
14 Premera had not produced the Accenture survey, however, there would be no legal basis
15 for asserting that such a document is required as part of a Form A Statement. The statute
16 prescribes what must be in a Form A; it nowhere suggests that the person filing the Form
17 A must simultaneously supply all documents that the person has consulted, cited, or relied
18 upon in preparing the Form A Statement. Still less does the statute suggest that the
19 absence of such supporting documents renders the Form A incomplete or deficient.²

20
21 ¹ The November 2001 Accenture survey is also attached to Mr. Cake's declaration.
Hence, with this filing, Premera has made the survey available to the Commissioner's
representatives yet again.

22 ² The Schedule asserts that a complete copy of the Accenture survey is required under
23 RCW 48.31C.030(2)(a)(ii) and (2)(d). These provisions require identifying information
24 about the acquiring party and any plans or proposals that the acquiring party has to
25 liquidate the health carrier, to sell its assets, etc. Any suggestion that this language
demands a copy of a survey conducted as part of a different transaction in another state,
involving someone not related to the applicant, is preposterous. The same thing can be
said of WAC 284-18A-910, Item 5, which reads: "Describe any plans or proposals which

1 B. Premera has not withheld any description of stock ownership plans from the
2 Commissioner. The OIC Staff and the States' Consultants did not object to
3 Premera's Exhibit G-10. In any event, a Form A Statement need not contain a
4 stock plan.

5 To assert that Premera failed to provide a required "Stock Ownership Plan" is
6 erroneous as a matter of both fact and law. The belated effort to allege a Form A
7 deficiency as to stock plans is directly inconsistent with the prior communications from
8 the Office of Insurance Commissioner ("OIC") and the States' Consultants. Moreover,
9 Premera has withheld nothing as to stock plans: Premera's Board of Directors has not yet
10 made a decision as to any stock plan. In any case, a stock ownership plan is not a required
11 part of a Form A Statement.

12 Premera did submit Exhibit G-10 to the OIC, setting forth limitations on future
13 stock ownership plans. Declaration of H.R. Brereton Barlow ("Barlow Decl."), ¶ 3.³
14 Neither the OIC nor the States' Consultants considered Exhibit G-10 deficient in any
15 respect as of November 26, 2002. Premera filed Exhibit G-10 ("Description of Stock
16 Ownership Plans") on October 25, 2002, after it received (a) the OIC deficiency letter
17 dated October 7, 2002, and (b) consultant data requests WA 19, WA 105, and WA 107
18 dated October 22, 2002. On November 19, 2002, the OIC sent Premera a follow-up list of
19 asserted deficiencies, after taking into account Premera's October 25 supplemental filings,

20 the applicant may have to declare an extraordinary dividend to liquidate such health
21 carrier, to sell its assets to or merge it with any person or persons or to make any other
22 material changes in its business operation or corporate structure or management."

23 ³ Exhibit G-10 states:

24 Recognizing that the Office of Insurance Commissioner has requested
25 information about potential stock programs, and in order to provide
assurances that future stock programs will be subject to certain limitations
and restrictions, the Boards of PREMERA and Premera Blue Cross have
authorized management to make certain commitments, as set forth in this
Exhibit G-10, to the Office of Insurance Commissioner, related to stock
programs . . .

1 made in response to the October 7, 2002 deficiency letter. The November 19 letter states:
2 "Attached is our second list of deficiencies. This list was prepared after considering all
3 prior supplementation by Premera."

4 The November 19 letter makes no reference to a continuing deficiency related to
5 stock plans, thereby indicating that Premera had satisfied any obligation regarding that
6 issue. Similarly, the States' Consultants indicated that Premera had fully satisfied data
7 requests WA 19, WA 105, and WA 107, all relating to description of stock plans. Cake
8 Decl, ¶ 9. Ms. Beusch can hardly claim now that Premera's Form A Statement is
9 deficient in light of something that the OIC previously deemed satisfactory.

10 The Schedule asserts, however, that there has been "a refusal [by Premera] to
11 provide the terms of the Stock Ownership Plans it intends to adopt," thereby implying that
12 Premera has withheld information about its intended plans. This is false. The Premera
13 Board of Directors as of the date of the filing of Exhibit G-10 had not, and as of this date
14 has not, adopted any stock ownership plan for the company. Barlow Decl., ¶ 4. Nor has
15 there been any decision as to what stock ownership plans may be adopted in the future.

16 Id.

17 That the Board had not adopted any stock ownership plan as of the filing of
18 Exhibit G-10 is reflected in that document itself:

19 As of the date of this filing, the Boards of PREMERA and Premera Blue
20 Cross have not approved any stock program, or made any determinations as
to the nature of any stock programs that may be adopted in the future . . .

21 See id., Exhibit B. Likewise, the minutes of the October 18, 2002 meeting of the Premera
22 Board of Directors affirm that "the Board is not being asked to approve any stock
23 programs, except to approve certain limitations on future stock programs in connection
24 with regulatory review of the company's conversion proposal." Id., ¶ 2 and Exhibit A
25 (produced to the States' Consultants with Bates nos. 25529-25531). The implication in

1 the Schedule that Premera has withheld information about stock plans is entirely
2 unfounded.

3 Finally, neither the Holding Company Acts nor the implementing regulations
4 require the filing of stock ownership plans as part of a Form A Statement. The provisions
5 cited by Ms. Beusch, RCW 48.31C.030(2)(e) and (g), have no relation to officer, director
6 and employee stock plans.

7 RCW 48.31C.030(2)(e) requires a company to provide information regarding
8 shares "that each acquiring party proposes to acquire" The term "acquiring party"
9 refers to the person or entity that will acquire control of a domestic health carrier.⁴ In the
10 Premera Form A Statement, the acquiring party is New Premera Corp., and the acquired
11 domestic health carriers are Premera Blue Cross and its health plan and life insurance
12 subsidiaries. Accordingly, this section applies to shares to be acquired by New Premera
13 Corp. which, on the consummation of the transactions contemplated in the Form A
14 Statement, will own 100% of the initial shares of New Premera Blue Cross. It does not
15 apply to shares of New Premera Corp. (the acquiring party) to be issued pursuant to future
16 stock plans to officers, employees or directors.

17 RCW 48.31C.030(2)(g) requires a description of "contracts, arrangements or other
18 understandings with respect to any security referred to in RCW 48.31C.010(3) in which
19 the acquiring party is involved" This "description must identify the persons with
20 whom the contracts, arrangements or understandings have been entered into." (Emphasis
21 added.) The statute does not require filing of information on possible future contracts or

22 ⁴ "No person may acquire control of a domestic health carrier unless the person has filed
23 with the commissioner . . . a statement containing the information required by this section
24 . . ." RCW 48.31C.030(1). The terms "Acquisition" and "acquire" mean "an agreement . .
25 .the consummation of which results in a person acquiring . . . the control of another person
.. " Id. The term "control," as defined in RCW 48.31C.010(3), includes a presumption
that ownership of 10% or more of the voting securities of an entity constitutes control.

1 arrangements that have not been entered into or even approved in concept at the date of
2 the filing of the Form A Statement.⁵

3 C. It is not now possible to specify, in detail, the assets and liabilities that will be
4 associated with Premera's Alaska operations at the time of their transfer. The
5 Form A Statement satisfies all of the requirements of the Holding Company Acts.

6 Premera currently operates as a single corporation in both Washington and Alaska.
7 The reorganization reflected in the Form A Statement contemplates that Premera's
8 operations in Washington and Alaska will, in the future, be conducted through two
9 separate subsidiaries of New PREMERA Corp: New Premera Blue Cross Corp. for
10 Washington, and Premera Blue Cross Blue Shield of Alaska Corp. ("Premera Alaska") for
11 Alaska. To separate its Washington and Alaska operations, Premera Blue Cross proposes
12 to transfer the assets and liabilities related to its operations in Alaska to Premera Alaska.
13 Exhibit G-11 is the form of a "Transfer of Assets Agreement" between Premera Blue
14 Cross and Premera Alaska to accomplish this goal.

15 Ms. Buesch asserts that Premera's Form A Statement is incomplete because
16 Schedules 1 and 2 to Exhibit G-11 do not list the specific assets and liabilities to be
17 transferred to Premera Alaska. This assertion is fundamentally mistaken. Schedule 1 of
18 Exhibit G-11, which will reflect the specific assets to be transferred, and Schedule 2,
19 which will reflect the specific liabilities to be transferred, cannot be filled out until the
20 transaction is imminent. These lists will reflect such assets and liabilities as are relevant
21 to Premera's Alaska operations at the date of the closing of the reorganization. Cramer

22
23
24 ⁵ WAC 284-18A-910, Items 7(c) and 8(c), do not apply for similar reasons. Item 7(c)
25 applies only to "contracts, arrangements or understandings [that] have been entered into."
(Emphasis added.) Item 8(c) is wholly inapposite to stock plans.

Decl., ¶ 7. The closing of the reorganization will occur at a future date, still to be determined, after the approval of the Form A Statement.⁶

The regulations that apply to Form A statements explicitly provide that information from an applicant “need be given only insofar as it is known or reasonably available to the person filing the statement.” WAC 284-18A-320.⁷

The final versions of Schedules 1 and 2 will list those assets and liabilities that are related to the Alaska operations at the time of the closing of the reorganization. Because such information is unknown and unknowable at this time, the lists cannot now be finalized. See Cramer Decl., ¶ 7. Premera so advised the OIC by letter dated January 17, 2003. Id., ¶ 8 and Exhibit B. There was no response or follow-up deficiency notice from the OIC prior to Ms. Beusch’s letter of September 10, 2003. In the meantime, the States’ Consultants declared themselves satisfied as of January 13, 2003 with Premera’s responses to Data Requests B138 and B139, which sought the same Schedules 1 and 2. Cake Decl., ¶ 10.

CONCLUSION

The Court’s Order granted the Commissioner an opportunity to identify with specificity any deficiencies in the Form A Statement that were identified prior to November 26, 2002 and that remain outstanding. The September 10, 2003 letter attached as Appendix A fails to identify any such deficiencies. Accordingly, the Commissioner has

⁶ To claim that Premera’s Form A Statement is incomplete because it lacks detailed schedules that cannot be determined until after the Form A is approved is a classic “Catch 22.” It cannot constitute a valid notice of deficiency.


⁷ Other statutes and rules make clear that detailed final schedules are not required for a complete Form A Statement. RCW 48.31C.030(2)(d) and WAC 284-18A-910, Item 5, call for a description of plans or proposals to change the corporate structure of a health carrier. These provisions do not require an applicant to submit the final form of all agreements that may be needed to accomplish a planned change of structure, let alone the detailed schedules of assets and liabilities that are alleged to be at issue here.

1 raised no issue that avoids the 60-day period set forth in the Order for his decision on
2 Premera's Form A Statement. The Court should so find.

3 DATED this 11th day of September, 2003.

4 Respectfully submitted,

5 PRESTON GATES & ELLIS LLP

6
7 By 
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PETITIONERS' MEMORANDUM REGARDING
SCHEDULE OF ALLEGED DEFICIENCIES - 9

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